STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DEMETRIS HOLDEN,

Defendant-Appellant.

UNPUBLISHED
June 5, 2008

No. 272633
LC No. 04-024329-FH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right following his convictions for burning of real property, MCL 750.73; arson of insured property, MCL 750.75; use of false pretenses with intent to defraud, MCL 750.218(4)(a); failure to file a tax return or filing a fraudulent tax return, MCL 205.27(1)(a); and committing a fraudulent insurance act, MCL 500.4511(1). Defendant was sentenced to concurrent terms of 23 months to ten years for the two arson convictions, 13 months to 5 years for the false pretenses and tax-related convictions, and 13 months to four years for the insurance fraud conviction. We affirm.

Defendant first argues that the evidence was insufficient to support his convictions for arson, burning of real property, insurance fraud, and false pretenses. We disagree.

We review a claim of insufficient evidence de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, would justify a rational trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Lange*, 251 Mich App 247, 250; 650 NW2d 691 (2002) (citations omitted). "Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007).

In order to convict the defendant of the crime of burning real property, the prosecution was required to establish: (1) that defendant burned a building, or the contents thereof; (2) that the building was not a dwelling; and, (3) that defendant intended to burn the building or its contents, or intentionally committed an act that created a very high risk of burning the building or contents, knew of the risk, and disregarded the same. MCL 750.73; see, e.g., *People v Nowack*, 462 Mich. 392, 404-410; 614 NW2d 78 (2000) (distinguishing between common law arson and statutory arson); CJI2d 31.3. The elements of the crime of burning insured property

are; (1) the burning of any building or personal property, (2) that was insured against loss or damage caused by fire, (3) with the defendant having knowledge that the property was insured, (4) where the defendant intended to set the fire without just cause or excuse, knowing that this would cause damage to property, and (5) where the defendant acted with an intent to defraud or cheat the insurer. MCL 750.75; CJI2d 31.5; *People v Ayers,* 213 Mich App 708, 721; 540 NW2d 791 (1995).

"It is the nature of the offense of arson that it is usually committed surreptitiously. Rare is the occasion when eyewitnesses will be available. By necessity, proofs will normally be circumstantial." *People v Horowitz,* 37 Mich App 151, 154; 194 NW2d 375 (1971). Taking the evidence in the light most favorable to the prosecutor, the jury could have found sufficient circumstantial evidence to convict defendant of the arson charges. Testimony at trial indicated that defendant purchased the home for $1,000 plus the outstanding back taxes (approximately $3,000-4,000) in the late fall of 2000. Within days, defendant purchased a $40,000 insurance policy on the home, indicating to the insurance company that there either was a tenant in the house or there would be within 30 days. Defendant, however, was unable to provide any contact information for the tenant and the home had no working utilities or water service. Defendant signed insurance paperwork containing other statements that could be construed as false, such as that he had owned the property for more than three years (which rendered it unnecessary to disclose that he had paid far less than the price for which he insured it) and that he was not behind on property taxes in the past two years even though the taxes were delinquent. The house was burned within weeks after the deed for the home was signed.

Although defendant explains the allegedly false statements as unintentional, the prosecution is not required to rule out every arguable theory of innocence, but is only required to prove its theory beyond a reasonable doubt. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000). Defendant's explanations depend entirely on his credibility, as do his claim that he had a prospective renter when he applied for insurance and his claim that he would have had the home ready to rent within 30 days. Considerations of credibility and the weighing of evidence are matters that are properly left to the jury. *People v Fletcher,* 260 Mich App 531, 561; 679 NW2d 127 (2004). Taking the above into consideration, this Court is satisfied that there was sufficient circumstantial evidence to convict defendant of arson and burning of real property.

There is similarly sufficient evidence to convict defendant of obtaining money by false pretenses and insurance fraud. The insurance agent testified that he would not have insured the property if defendant did not intend to rent it within 30 days and that the insurance company might not have insured it for $40,000 if defendant had disclosed the purchase price as required on the insurance application. Again, statements made by defendant concerning the insurance application could therefore be viewed as false and defendant's explanation for his false statements depended on his credibility. The jury, taking into account the above as well as the evidence of arson and defendant's filing an insurance claim for the burned home, could conclude that defendant intended to defraud the insurer and obtain money by false pretenses.

Defendant next argues that the tax fraud charge should have been severed from the other charges. We disagree. Whether defendant's charges are related is a question of law which is reviewed de novo, and "[t]he court's ultimate ruling on a motion to sever is reviewed for an abuse of discretion." *People v Girard,* 269 Mich App 15, 17; 709 NW2d 229 (2005).

In this matter, defendant brought an oral motion to sever the charges on the first day scheduled for trial. Notably, MCR 6.120(B)(2) authorizes the trial court to consider the timeliness of a motion for joinder or severance in determining whether the same would be appropriate. On the basis of timeliness alone, it could be said that the trial court acted within its discretion in denying defendant's motion for severance.

Moreover, the charges were related. Under MCR 6.120(C), the court must sever unrelated offenses for trial. Offenses are related for purposes of this rule only if they are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1). The prosecutor's theory was that defendant intentionally burned the home as part of his plan to make money off the property by various fraudulent methods, including making false statements to the insurance company to obtain coverage worth more than the value of the home, and reporting, for tax purposes, over $30,000 in expenses for the property in the short time that he owned it. The tax return information concerning expenses for the property, when viewed together with other affirmative statements by defendant concerning the property (i.e. reporting to the insurance company that a tenant did or would live in the home within 30 days despite the fact that there were no working utilities at the home and defendant had no contact information for the potential tenant; reporting to the insurance company that there were no delinquent taxes on the property) can be viewed as a series of acts constituting a single plan to obtain money from ownership of the property that far exceeded the actual value of the property. That the tax fraud charge was related to the other charges further supports our determination that the trial court did not abuse its discretion in denying defendant's motion to sever.

Defendant next argues that his conviction should be reversed because his home was illegally searched and that items improperly seized should have been suppressed as "fruit of the poisonous tree." We disagree.

Defendant, having cited no portion of the record demonstrating that he raised this argument before the trial court, has not preserved this issue for appeal. See, *People v Milstead*, 250 Mich App 391, 404 n 8; 648 NW2d 648 (2002). An appellate court will not reverse a conviction based on an unpreserved issue except for plain error that affected a defendant's substantial rights by resulting in the conviction of an actually innocent person or seriously affecting the integrity, fairness, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999).

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures and provides that no warrants shall issue without probable cause. U.S. Const., Am. IV. The Michigan constitutional provision is substantially the same. Const. 1963, art. 1, § 11. "Essentially, in order to search a dwelling for evidence of a crime, the police must have probable cause to search, and must also have a warrant based on that probable cause. . . thus, in order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement." *People v Davis*, 442 Mich 1, 9-10; 497 NW2d 910 (1993). Examples of exceptions to the warrant requirement are: (1) searches incident to arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. *Id*. Additionally, the inevitable discovery rule provides that evidence obtained through an unconstitutional search may "still be admitted at trial if the prosecution establishe[s] by a preponderance of the evidence that

the information ultimately or inevitably would have been discovered by lawful means." *People v Brzezinski*, 243 Mich App 431, 435; 622 NW2d 528 (2000); see also *Nix v Williams*, 467 US 431, 444; 104 S Ct 2501; 81 L Ed 2d 377 (1984). "If the evidence would have been inevitably obtained, then there is no rational basis for excluding the evidence from the jury." *Brzezinski, supra* at 435-436.

In this instance, defendant apparently sustained damage to his residence (unrelated to the arson charge at issue) and submitted a claim to his insurance company for the damages. An insurance investigator went to defendant's home and, with defendant's permission, entered the home to evaluate the damage. While in the home, the investigator noticed several lit candles set on top of scraps of paper in a crawlspace of the home. The investigator called the police, who went to the residence and seized the scraps of paper. The scraps of paper, which were not admitted into evidence, contained alleged "prayer requests" written by defendant and made reference to his insurance company and police officers. The papers led to further investigation into defendant's insurance claim concerning the property currently at issue and, ultimately, his arrest in the instant matter.

Defendant's argument that the improper search of his home and the ultimate seizure of the papers requires reversal fails for two reasons. First, the seized documents were not discovered by the police and were not admitted into evidence. Second, the burning of ten unattended candles atop slips of paper in the crawl space of a home behind a water heater presented an obvious fire hazard and a danger to anyone in or near the home. Accordingly, the officer responding to the scene was justified in looking inside the crawl space. Once he determined that there were lit candles behind a water heater, he was justified in entering the crawl space and seizing the items which could have started a fire.

Defendant's next argument on appeal is that he is entitled to resentencing because offense variables were erroneously scored. A sentencing court's decision in scoring OV points will not be reversed on appeal unless the decision was clearly erroneous. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). Scoring decisions under the sentencing guidelines are not clearly erroneous if "there is *any* evidence in support of the decision." *Id.*

MCL 777.39(1)(b) authorizes the scoring of ten points for OV 9 when, "There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." A photograph admitted at trial showed that the fire had melted siding on the home next door and there was evidence that three people resided in that home at the time of the fire. Even assuming that those neighbors were not home at the time of the fire, the damage to the home represents potential property loss and, it can reasonably be inferred that the neighbors had property inside the home. These neighbors were certainly placed in danger of some property loss, and the insurance company suffered actual loss in the form of paying monies for defendant's burned home. Accordingly, because at least four victims faced the danger of property loss, the trial court did not clearly err in scoring ten points for OV 9.

Defendant next argues that OV 13, addressing a continuing pattern of behavior, should have been scored at zero instead of ten points because he had no prior convictions. We disagree.

MCL 777.43(1)(c) provides for scoring ten points if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or

property." Here, the arson was part of a pattern of criminal activity involving three or more crimes against property because defendant was also convicted of false pretenses, burning of insured property, and insurance fraud all arising from the arson. As a result, the trial court did not abuse its discretion in scoring this variable at ten points.

Defendant next contends that OV 16 should have been scored at five points instead of ten because the value of the property was less than $20,000. We agree, but find this error to be harmless.

MCL 777.46 provides as follows:

> (1) Offense variable 16 is property obtained, damaged, lost, or destroyed. Score offense variable 16 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (b) The property had a value of more than $20,000.00 or had significant historical, social, or sentimental value ..... 10 points
>
> (c) the property had a value of $1,000.00 or more but not more than $20,000.00..... 5 points
>
> (2) All of the following apply to scoring offense variable 16:
>
> (a) In multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement.
>
> (b) In cases in which the property was . . . destroyed, use the value of the property in scoring this variable. If the property was damaged, use the monetary amount appropriate to restore the property to pre-offense condition in scoring this variable.

Here, the insurance company settled defendant's claim for $15,000 and $3,669 in demolition costs, and the prosecutor charged defendant with false pretenses for an amount less than $20,000. Additionally, defendant purchased the home for $1,000 plus back taxes less than $5,000. Although the prosecutor argued that the court should consider either the $40,000 amount the propery was insured for or the restitution amount of $29,000, in scoring OV 16, there is no evidence that either figure constitutes the actual value of the property or the replacement cost of the property.

Had OV 16 been properly scored, defendant's overall OV score would have been twenty-five points rather than the thirty he received. However, for this class D offense, OV level III

applies to offenses having twenty-five to thirty-four OV points. MCL 777.65. The scoring error therefore did not alter defendant's guidelines range and remand for resentencing is unnecessary. See *People v Francisco*, 474 Mich 82, 92, n 8; 711 NW2d 44 (2006).[1]

Defendant also argues that the amount of restitution, $29,996 is excessive because it includes attorney fees and investigation costs, which are not contemplated by MCL 769.1a or 780.766. We disagree.

We generally review for an abuse of discretion an order of restitution. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). However, "[w]hen the question of restitution involves a matter of statutory interpretation, review de novo applies." *Id.*

The attorney fees challenged by defendant are not the cost of prosecuting defendant but represent the various costs, totalling $4,176.75, incurred by the insurance company for, among other things, investigating the validity of the claim. The trial court did not abuse its discretion in awarding restitution because MCL 780.767(1) provides, "In determining the amount of restitution to order . . . , the court shall consider the amount of the loss sustained by any victim as a result of the offense." All of the amounts listed were incurred by the insurance company as a result of the offense. See, *Id.* at 709-714.

Defendant next argues that he was denied the effective assistance of counsel. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

The basis for defendant's ineffective assistance of counsel claim is that counsel failed to question the insurance company's investigating attorney regarding a letter the attorney had written recommending payment of defendant's claim and which defendant claims was thus exculpatory. Declining to cross-examine the investigating attorney regarding the allegedly exculpatory letter was a matter of sound trial strategy. Defendant filed a motion for remand in connection with this issue, which this Court granted on May 4, 2007. At a hearing held on remand, the investigating attorney, Mr. Meter, testified that he recommended payment of defendant's insurance claim in 2001, and that, based on the information he had at the time, he did not feel there was enough evidence to connect defendant with the fire at the home. Mr. Meter

[1] The judgment of sentence states that defendant was convicted and sentenced for burning of a dwelling house under MCL 750.72, but he was actually convicted of the alternate count of burning of real property other than a dwelling, MCL 750.73. If this typographical error has not yet been corrected, the judgment of sentence should be amended to reflect that defendant was convicted of burning of real property other than a dwelling.

also testified, however, that he later became aware of other information concerning the fire and that had he had such information available to him at the time of his initial recommendation, his opinion would have been different.

At the same hearing, defendant's trial attorney testified that he declined to question the attorney regarding his opinion in the letter because the letter did not reflect his later opinion as to whether defendant started the fire and he did not want to open the door to unfavorable testimony. Defendant's trial attorney additionally testified that he spoke to Mr. Meter about the letter before trial and that Mr. Meter had advised the attorney that defendant had filed insurance claims other than the one at issue. Mr. Meter also advised that the opinion expressed he expressed in the letter had since changed. Assuming, without deciding, that the letter would have been admissible, defendant has not shown that his trial counsel's declining to introduce or pursue the letter was unreasonable as a matter of trial strategy, since questioning the attorney about his earlier opinion would have opened the door to testimony that his opinion had changed.

Defendant next argues that the trial court lacked jurisdiction because documents such as the complaint, warrant, and register of actions were not filed with the trial court. We disagree. Whether a court has jurisdiction is a question of law that is reviewed de novo. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997).

Defendant brought a motion to vacate his sentence below based on substantially this same theory, and although the trial court acknowledged that the complaint filed in the record was not properly stamped with the date when filed as required by MCR 8.119(C), such error was harmless because the register of actions showed that the complaint and warrant were the first documents filed in the case on April 7, 2003. Also of note, the original felony complaint and warrant appear in the file and contain signatures of the assistant prosecutor, complaining witness, and the district judge and are dated April 7, 2003. While defendant alleges that these documents were missing from the file when he requested them, defendant has provided no support for his assertion. Accordingly, defendant is not entitled to relief based on this issue.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto